

## **FACT SHEET: WILLS**

### **What is a Will?**

A will is a legal document providing for the disposal of the will-maker's property after their death.

### **Formal Requirements for a Valid Will?**

There are a number of formal requirements that are necessary for a valid will. For a will to be valid:

- the will-maker must be over 18 years of age and have mental capacity and understanding of the nature and effect of the will;
- must be in writing;
- dispose of the will makers property upon their death;
- be signed by the will-maker with the intention that their signature will give effect to the will;
- the will-maker signed the will in the presence of 2 or more witnesses at the same time and the witnesses sign the will in the presence of the will-maker.

### **What if the will does not comply with formal requirements?**

If a will does not comply with the formal requirements it may still be an effective will if:

- the court is satisfied the deceased person intended the document to be a will (that is, to dispose of their property upon their death); and
- the document is of a person who died after 31 Oct 1989.

### **Changing a Will?**

***Before a Will is Signed:*** the will-maker may change the will before it is signed. The will-maker and the witnesses **MUST** sign or initial each change in the margin or near the alteration.

***After a Will is Signed:*** Once the will has been signed it CANNOT be altered or changed. If the will-maker wishes to update the will, they may either:

- update the will by adding a written document (called a codicil) outlining the changes to the will. This document must meet all the formal requirements of a valid will. The will-maker may find it easier to draft a new will; or
- make a new will – this will automatically cancel any previous will.

### **Where to Keep a Will**

A will should be kept somewhere safe and where it can be easily found. The original document may be kept with the will-makers bank, lawyer or with the Public Trustee. It is a good idea for the will-maker to keep a copy of the will with other personal papers.

### **Revoking a Will**

An existing will may be revoked (cancelled) by:

- marriage;
- divorce;
- making a new will.

## **Can Your will be Challenged?**

A claim questioning the validity of a will may be made on the following grounds:

- At the time the will was made the will-maker did not have mental capacity to understand what a will was or the nature and effect of the will (ie. they did not have testamentary capacity);
- Parts of the will were changed after being signed;
- The will-maker made the will under undue influence (pressured or forced into making the will);
- The will has been revoked by marriage, divorce or a new will.

## **Challenging the Will under the *Family Provision Act 1982 (NSW)*?**

An 'eligible person' may apply to the court for provision out of the estate on the basis that they have not been adequately provided for by the will-maker.

### ***Who is an eligible person?***

An 'eligible person' includes:

- Husband/wife, de-facto partner (living together in domestic relationship for more than 2 years) or former husband/wife;
- Child;
- A person who at any particular time was dependent wholly or partly on the deceased and is either a grandchild or was a member of the household of which the deceased was a member.

### ***Time limit for making a Family Provision Application?***

Application must be made **within 18 months** of the date of the death of the deceased. The time may be extended if:

- the parties to the proceeding consent; or
- there is sufficient cause to show why the application was not made in time.

### ***What will the Court consider when deciding a Family Provision Application?***

In determining what provision may be made out of the estate, the Court may take in to consideration:

- financial and non-financial contributions, (directly or indirect), of the person to the acquisition, conservation or improvement of property of the deceased or the welfare of the deceased (including contributions as homemaker);
- The character & conduct of the person before and after the death of the deceased;
- Circumstances existing before and after the death of the deceased; and
- Any other matter considered relevant in the circumstances.

*Disclaimer: This fact sheet provides general information and does not provide legal advice. If you have a legal issue, you should contact a lawyer before making a decision about what to do or applying to a court.*